

THOMAS J. MANTON
3 7TH DISTRICT, NEW YORK

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Congress of the United States
House of Representatives
Washington, DC 20515-3207

August 30, 1994

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The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, Northwest
Room 814
Washington, D.C. 20554

Dear Chairman Hundt:

I am writing with regard to a pending petition seeking reconsideration of the Commission's rules promulgated to implement the 1992 Cable Act's Provisions regarding exclusive distribution arrangements. In its First Report and Order in the program access proceeding, the Commission determined that the exclusivity provisions of the 1992 Cable Act were designed to restrict the ability of cable operators to enter into exclusive distribution arrangements with vertically integrated programmers. The petitioner, however, seeks to extend those restrictions to prohibit all exclusive distribution agreements, including those between non-cable distributors, such as direct broadcast satellite ("DBS") systems, and vertically integrated programmers.

I believe that the approach adopted by the Commission in its current rules is correct for both statutory and policy reasons. Thus, for the reasons set forth more fully below, I urge the Commission to retain its current rules regarding exclusive distribution arrangements.

The program access provisions of the 1992 Cable Act were intended to enhance the ability of alternative distribution technologies to compete with cable in order to reduce the market power of cable operators as well as to increase diversity in the distribution of programming. One mechanism used by cable operators to increase market power was to enter into exclusive distribution arrangements with vertically integrated programmers. Sections 628 (c)(2)(C) and (D) were specifically designed to limit the ability of cable operators to continue this practice.

Specifically, Section 628 (c)(2)(C) was intended to prohibit cable operators from obtaining exclusive distribution rights in areas that were not served by cable. These arrangements operated only to deprive consumers residing in unserved areas of the ability to receive important program services. For areas served

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by cable, Section 628 (c) (2) (D) placed restrictions on, but did not absolutely prohibit, the ability of cable operators to enter into exclusive arrangements. In those circumstances, the statute allows cable operators to enter into exclusive arrangements if they can demonstrate to the Commission that the public interest will be served.

Those urging the Commission to change its rules argue that, regardless of the specific prohibitions contained in Sections 628 (c) (2) (C) and (), other portions of the program access provisions prohibit all exclusive arrangements. As an initial matter, I note that if the general provisions of Section 628 were designed to restrict all exclusive distribution arrangements, the specific provisions would be superfluous. If those other provisions were sufficient -- or even intended -- to cover such arrangements, it would have been totally unnecessary to cover the subject in a later subsection. Moreover, as demonstrated below, the approach urged by those seeking to change the Commission's rules would serve only to place cable operators in a more advantageous regulatory position than non-cable distributors -- a result totally at odds with the entire purpose of the 1992 Cable Act.

As discussed above, Section 628 (c) (2) (D) specifically allows cable operators to enter into exclusive distribution arrangements in their service areas if the Commission finds that the public interest is served. That provision applies only to cable operators. The 1992 Cable Act does not contain a parallel provisions concerning exclusive arrangements with non-cable distributors. Thus, under the interpretation advocated by those opposing the Commission's current rule, only cable operators would be able to obtain exclusive distribution rights from vertically integrated programmers. Clearly, it should be incredible to construe the program access provisions of the 1992 Cable Act in such a manner that non-cable distributors are regulated more stringently than cable operators. The better interpretation is the one currently set forth in the Commission's rules -- that the program access provisions were never intended to limit the ability of non-cable distributors to obtain exclusive distribution arrangements.

These arrangements were not prohibited by the statute because exclusive distribution arrangements between vertically integrated programmers and non-cable distributors that lack the market power of cable operators can be pro-competitive. Indeed, the potential benefits of such agreements are illustrated by the DBS distribution arrangements that United States Satellite

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Broadcasting Company, Inc. ("USSB"), Stanley S. Hubbard's DBS subsidiary, has entered into with programmers such as Viacom International and Time Warner.

Because USSB will be able to program only approximately 30 channels, as opposed to the approximately 150 channels available to its competitor, Hughes's DBS subsidiary, DirecTV, Inc., the exclusive arrangements are vital to help USSB to differentiate its program offerings and become a viable DBS competitor. As a practical matter, Hughes will be able to offer a substantial amount of programming to consumers on a de facto exclusive basis -- whether or not the Commission changes its rules -- simply because it has the technical capability to carry significantly more program services than USSB. Thus, prohibiting USSB from entering into an exclusive DBS distribution arrangement merely denies the USSB a significant competitive advantage that its principal competitor would continue to enjoy in any event.

In addition to promoting competition to cable and competition within DBS, exclusive DBS arrangements benefit the consumer by increasing the diversity of program offerings available to DBS subscribers. Mandating non-exclusives would result in the duplicative transmission of the same program services, serving only to waste valuable limited DBS transponder capacity to the detriment of distributors and consumers.

Finally, it is important to note that USSB's exclusive arrangements do not deprive any potential DBS subscriber of the ability to receive any program service. USSB shares a satellite with Hughes, its principal DBS competitor, that is able to serve consumers nationwide. Because all DBS consumers will be able to use the same equipment to receive all services available on that satellite, consumers may subscribe to the service offerings of both USSB and its larger competitor. Thus, unlike prohibited cable exclusives, USSB's arrangements will allow all consumers - in urban and rural areas alike -- to receive the subject program services at prices below what cable operators charge for comparable program packages.

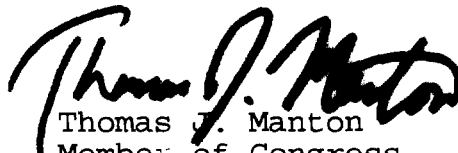
In sum, the best way to promote the development of DBS as an effective competitor to cable, and to promote competition within DBS, is to permit DBS distributors to enter into exclusive arrangements with programmers. Accordingly, I urge the Commission to maintain its current rules that allow non-cable distributors to enter into exclusive arrangements with vertically integrated programmers.

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Thank you for your consideration of these views.

With best wishes, I am

Sincerely,


Thomas J. Manton
Member of Congress

TJM/ebo

cc: Commissioner James H. Quello
Commissioner Andrew C. Barrett
Commissioner Rachelle B. Chong
Commissioner Susan P. Ness
Meredith J. Jones, Esq.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

OCT 24 1994

IN REPLY REFER TO:
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The Honorable Thomas Manton
U.S. House of Representatives
203 Cannon House Office Building
Washington, DC 20515-3965

Dear Representative Manton:

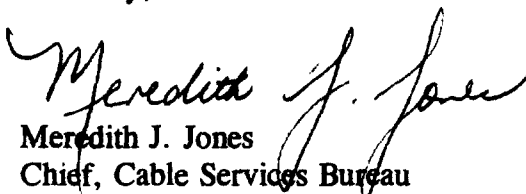
The Chairman has asked me to respond to your letter concerning the Federal Communications Commission's *First Report and Order* implementing Section 19 of the Cable Television Consumer Protection and Competition Act of 1992.

Specifically, your letter requests that the Commission reaffirm its finding in the *First Report and Order* that Section 19 prohibits only exclusive contracts between vertically integrated cable programmers and cable operators in areas unserved by cable operators, and does not cover exclusive contracts with direct broadcast satellite (DBS) providers. You state further that, the United States Satellite Broadcasting Company's exclusive arrangements do not deprive any DBS subscriber of the ability to receive any program service.

The issues you have raised, along with others, are pending reconsideration of the Commission's current program access rulemaking proceeding. As such, any discussion by Commission personnel concerning these issues outside the context of the rulemaking would be inappropriate. However, you may be assured that the Commission will take into account each of the arguments raised by you and your colleagues concerning these issues to arrive at a reasoned decision on reconsideration.

I trust this information is responsive to your inquiry.

Sincerely,


Meredith J. Jones
Chief, Cable Services Bureau